

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA,

5 v.

15 Cr. 611 (AJN)

6 BENJAMIN WEY,

7 Defendant.
-----x

8 New York, N.Y.
9 February 17, 2017
10 10:10 a.m.

11 Before:

12 HON. ALISON J. NATHAN,

13 District Judge

14 APPEARANCES

15 PREET BHARARA

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17 Southern District of New York

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1 (Case called)

2 THE COURT: We are here for oral argument or summation
3 argument following the evidentiary hearing we had on Mr. Wey's
4 motion to suppress. I did receive post hearing briefing from
5 counsel and I thank you for that. I think how I would like to
6 proceed, I do have time. I have the morning set aside for
7 this. I don't know that we will need it. I do in part because
8 the briefs just came in and I'm in trial. I think I'm not as
9 laser focused on what I need to get out, so I am going to give
10 you a little bit more room to talk and lay out the structure of
11 your argument. I think we will do 45 minutes per side and I
12 think the government, I'll have the government go first, though
13 it is Mr. Wey's motion on the question of good faith is the
14 government's burden. My suggestion, unless anyone requests
15 otherwise, is to have the government go first and you can
16 reserve some time, Mr. Ferrara.

17 MR. FERRARA: Thank you, your Honor. I'll reserve
18 some time. I don't think I am going to need all the 45
19 minutes. With the Court's permission, I will speak from the
20 lecturn at the court reporter's request.

21 THE COURT: I do what they say and so should you.

22 MR. FERRARA: Your Honor, as your Honor knows, the
23 touchstone of the Fourth Amendment is reasonableness. The
24 purpose of the exclusionary rule is to deter government
25 misconduct and that's why we have the good-faith exception, and

1 here the government acted in good faith.

2 There was a 97-page affidavit that laid out in detail
3 the fraud that was occurring at NYGG. It detailed the
4 investigation and of course the affidavit listed the statutes
5 under investigation. There was an opposite plan that described
6 the investigation that was circulated to the search team. And
7 nevertheless the Assistant United States Attorney took the
8 extraordinary step of going and personally meeting with the
9 search team prior to the search to ensure they understood the
10 investigation and the scope of the warrant.

11 Moreover, the case agent was on the premises at all
12 times, both premises, taking questions and attempting to
13 doublecheck the work of the other agents.

14 Any errors in this search were not the sort of
15 sufficiently deliberate conduct that exclusion can meaningfully
16 deter, nor are they sufficiently culpable that such deterrence
17 is worth the price paid by the justice system and that's
18 *Herring*. There are other remedies Mr. Wey can pursue if he
19 believes his rights were violated. We don't think those are
20 warranted, but this is not a case that warrants suppression.

21 The way I would like to proceed, your Honor, I would
22 like to first point out a few liberties that the defense takes
23 in their brief, and I'll sort of jump around in doing that a
24 little bit, and then I would like to talk a little bit about
25 the physical search and then move into the electronic search

1 and the handling of that material.

2 THE COURT: A preliminary remark. Obviously, based on
3 the order of the hearing and what I just said, this is
4 structured around the good-faith question. As a preliminary
5 matter, in your opening briefs prehearing you had made an
6 all-records argument. I want to know whether the government
7 maintains that argument or not.

8 MR. FERRARA: Yes, your Honor, we do. We think that
9 in this context the all-records exception, that law applies
10 here because, again, though the affidavit does not go so far as
11 to say that everything NYGG did was fraudulent, it goes far
12 enough that essentially we believe the agents could have gone
13 in and taken almost everything. They didn't, your Honor. You
14 heard them say that they attempted -- they were looking through
15 documents.

16 THE COURT: Help me understand the sort of way in
17 which the all-records law applies. In other words, doesn't the
18 government need to go to the magistrate judge and say, here is
19 probable cause and necessity of an all-records search and the
20 agents understand that that's the nature of the search. In
21 other words, analytically are you saying sort of, no matter
22 whether we thought there was reason to go for an all-records
23 search here, no matter what the officers thought, post hoc if
24 we can establish -- help me understand how you want to impose
25 the all-records exception here, given that the testimony of the

1 agents was no, no, we couldn't take everything. We were
2 constrained. There was narrowness, etc.

3 MR. FERRARA: I think the argument we are making here,
4 your Honor, is that this warrant did not suffer from sort of
5 overbreadth or lack of particularity in this case. I think
6 that is where we are citing -- in large part relying on the
7 all-records exception. Here the all-records doctrine --

8 THE COURT: I understood what you just said to be the
9 opposite --

10 MR. FERRARA: What I'm trying to say, your Honor, is
11 if a business is permeated by fraud, then the all-records
12 exception will allow a search -- a search warrant will not
13 offend the particularity requirement by calling for a very,
14 very broad range of records. And I think that's the idea --

15 THE COURT: Wouldn't the theory of that be that the
16 search warrant is authorizing a search of all records?

17 MR. FERRARA: Your Honor, I apologize. I don't have a
18 case. My understanding is not so much that the warrant says,
19 you are authorized to seize all records. My understanding of
20 the way this exception works is that it is a very, very broad
21 warrant that otherwise might appear out of bounds or overbroad
22 or lack particularity, will be held to be reasonable under the
23 Fourth Amendment because the business -- there is so much fraud
24 baked into the business that we are going to allow a broader
25 warrant than we otherwise might. And that is my understanding

1 of the law and we believe that applies here to this warrant.

2 Your Honor is correct, the agents did not understand
3 they were doing that. That's not what they testified to. We
4 don't have a situation here where either AUSA Massey or the
5 agents believed they were writing a warrant or executing a
6 warrant that allowed the government to take everything,
7 absolutely right.

8 We were, I think, advancing the all-records exception
9 for the proposition that the warrant itself is not overbroad
10 and it goes to this idea, your Honor, that it's hard to imagine
11 how AUSA Massey and Agent Komar would write an affidavit and a
12 warrant for a business like this if this warrant is overbroad.
13 If the Court finds this to be overbroad or that the agents
14 unreasonably seized too broad a range of documents, it's hard
15 to know how the government could execute a search like this if
16 a business is so permeated with fraud.

17 Taking the defense argument to sort of its logical
18 conclusion, how does one write a warrant where you think a
19 business is a fraud. And AUSA Massey attempted to do that
20 here. You are right, he did not say, we are entitled to take
21 all the records. But what we think this law stands for is the
22 idea that this warrant was not overbroad because of the nature
23 of this business. That's why we are citing that law.

24 Your Honor, let me turn back then to some points that
25 are made in the defense brief that I just want to correct

1 certain liberties. First, your Honor, I wanted to flag, the
2 defense cites this case *People v. Thompson*. It's a New York
3 Supreme Court case from 2016. I want to flag that. At 722 and
4 723 of that opinion, the Court actually declined to order
5 blanket suppression, essentially making a good-faith finding
6 under New York law. I wanted to flag that. *Thompson*, for what
7 it's worth, relied on *Ganias I*, which of course the Second
8 Circuit vacated in an en banc decision. In fact, defense
9 counsel himself cites *Ganias I*. That case is simply not good
10 law, as the Court is aware. I think it's inappropriate to cite
11 *Ganias I*. He does that at 16 of his brief.

12 Defense counsel suggests that it was inappropriate for
13 the government to retain a full set of the electronic evidence
14 seized and this is where *Ganias* comes in because *Ganias II*
15 speaks to that. And your Honor is of course familiar with the
16 discussion of not thinking about electronic media and files as
17 paper files. *Ganias* has a lengthy dicta discussion of that.
18 And *Ganias* sort of comes out in dicta saying, it's important to
19 maintain everything for authentication purposes, for instance,
20 and to allow the defense to sort of see what's been done and
21 allow them to redo it or do their own thing with it. We don't
22 think there is anything inappropriate for us maintaining all of
23 this material for the period we have. In fact, we think it
24 would be inappropriate for us to have not maintained it.

25 Also with the facts, your Honor --

1 THE COURT: Just a moment. It would have been
2 inappropriate. Why is that?

3 MR. FERRARA: Let me make a finer point.

4 THE COURT: Let me ask, is there nonresponsive
5 material on what's been obtained?

6 MR. FERRARA: For instance, your Honor, let me talk
7 about electronic material and the physical material to make
8 sure I'm not conflating.

9 THE COURT: I thought you were on electronic.

10 MR. FERRARA: I am. But I don't want the Court to
11 misunderstand what I'm saying.

12 As to the physical material, for instance, I don't
13 think it would have been inappropriate for us to say to defense
14 counsel back in 2012 or 2013, we have these x-rays of Mrs. Wey.
15 If you want those back, we will give them to you back. We
16 should not have seized them, for instance, and create some sort
17 of record to show that we had because, of course, we want Mr.
18 Siegal to be able to make this motion. It's important it
19 doesn't look like we are trying to hide it. It would not have
20 been inappropriate for us to say, would you like these back.
21 And we are, of course, prepared to return those.

22 On the other hand, in the electronic evidence, yes,
23 your Honor, I think it would have been inappropriate for us to
24 have given back sort of our copies of it. It's appropriate to
25 give back originals, as long as we have an image, or to give an

1 image, as long as we have an original.

2 Once we have it, this is what *Ganias II* talks about.
3 We ought to keep an entire copy of what we have and there is a
4 couple different reasons for that. One is that this isn't like
5 handing back a piece of paper. If we take the x-ray out of the
6 box and hand it back, we can put a piece of paper in there that
7 says, there was an x-ray here if anyone wants to know where it
8 came from or where it was found. But electronic files consist
9 in various places across the scope of a hard drive, of a
10 database. There is metadata stored in one spot. I wish I knew
11 more about it and, of course, *Ganias II* sort of very
12 thoughtfully talks about this. It's not as easy as simply
13 giving back a file. If you take files out of a hard drive or
14 off of a hard drive, you have changed the nature of the file,
15 you have changed the nature of the hard drive in multiple
16 different ways that a forensic examiner would be able to
17 identify and describe.

18 So that's what we don't want to do. We won't don't
19 want to do it because we don't want to suggest that we have
20 tampered with anything, that when we tried to offer a document,
21 we don't want to suggest that we have tampered with it somehow.
22 For instance, your Honor, an obvious example of this is if, for
23 instance, you were to click open a Word file. You might change
24 the date viewed, for instance. That would be metadata that you
25 might change. That's sort of a very easy one. It starts to

1 get very complicated when you talk about deleted files and
2 slack space. That starts to get super complicated.

3 No. 1, we want to make sure that it doesn't appear
4 that we have tampered with something. Of course, we actually
5 don't want to tamper with something.

6 No. 2, we want defense counsel to come in and be able
7 to say, well, I want to run my own searches. I want a clean
8 version to run my own searches. I want to see what the
9 metadata says. I want to look in different places, different
10 sort of slack space, interstices of different files and
11 metadata that are beyond my comprehension but that to computer
12 people is a very important part of electronic files. If we had
13 started deleting files, removing files, we are changing the
14 very nature of the hard drive in ways that *Ganias II* suggests
15 are inappropriate. That's why we believe we needed to maintain
16 the entirety of those electronic files.

17 THE COURT: Extrapolating that the government's theory
18 is that with any seizure of electronic devices the government
19 not just can but must indefinitely retain all electronic files,
20 regardless of degree of responsiveness to the warrant?

21 MR. FERRARA: I don't think indefinitely. I would say
22 that once the case is concluded, that ought to be returned or
23 destroyed.

24 THE COURT: For the life of the case, no matter how
25 long from seizure to indictment and trial?

1 MR. FERRARA: I think that's absolutely right. But
2 *Ganias II* speaks to the idea that there are remedies for a
3 defendant who believes something is being held and wants it
4 back. I believe it's Rule 35, off the top of my head. Motion
5 for return of property could be appropriate. *Ganias II* speaks
6 to that as well. Yes, your Honor.

7 I believe had we started manipulating those hard
8 drives in ways that deleted things and removed things that we
9 would have a different motion here that we had tampered with
10 evidence. I think it's absolutely appropriate for us to
11 maintain a complete version.

12 THE COURT: Is that contingent upon having provided
13 copies of, in some cases, originals but in some cases copies of
14 the data, or is it separate and aside from that?

15 MR. FERRARA: I don't know that it's contingent, your
16 Honor, to be honest. I can think of cases where it might be
17 inappropriate, for instance, for safety reasons to return
18 certain things. It might be that you have a case where you
19 seize a cell phone from someone who is accused of harassment or
20 stalking or assault of some type and the victim's information
21 is on the cell phone, and I can see a situation where you do
22 not return that, for instance. So I'm not prepared to say that
23 we would always return something, but, again, I don't think the
24 Court has to reach that here because in fact we did return
25 originals or images. And here there were legitimate reasons to

1 do that, including allowing NYGG to continue to run, to the
2 extent it had legitimate business to do.

3 Your Honor, since we are talking about it, maybe I'll
4 reverse course a little bit and keep talking about the
5 electronic evidence a little bit and maybe we will go back to
6 the search, since we are on this topic. There are a few things
7 I want to point out about some assertions the defense makes in
8 the context of the electronic evidence.

9 First, I want to talk about the search terms, this
10 idea, this argument that the search terms somehow expanded the
11 scope of the warrant because I think it's a misleading way for
12 defense counsel to talk about how the search is done. There is
13 nothing inappropriate about the search term list and I think
14 what the defense is doing is confusing searching and seizing.
15 This is basic, but I want to say it. Agents could have gone
16 through every single electronic item in those computers to see
17 if a document was captured by the warrant. Instead, for
18 efficiency, they ran search terms, and the search terms do not
19 have to be tied to what is in the warrant rider.

20 Let me use an easier example which I think is
21 analogous and helpful which would be a warrant that would call
22 for evidence of heroin trafficking, and you seize a computer
23 from a suspected drug trafficker and the warrant says you can
24 seize information related to heroin trafficking. You are going
25 to run searches on that computer appropriately for words like

1 brick, dope, kilo. Those are going to be appropriate words to
2 search for and they may never have appeared in the warrant.
3 But no one would suggest that you couldn't search for those
4 things.

5 Now, if you searched for dope and you got an e-mail
6 where the suspected drug trafficker says, calls his brother a
7 dope for waking up too late, you are not going to seize that
8 because that's not the dope you are looking for. But those
9 searches are not in and of themselves inappropriate or unlawful
10 or unreasonable simply because they are outside the scope of
11 the warrant. That's what happened here.

12 In fact, Agent McGuire made clear that that was his
13 understanding of how that would work and, for instance, there
14 is Government Exhibit 21, which is his e-mail, which he says to
15 AUSA Massey, I'll make sure these terms return responsive
16 material, and your Honor saw his meticulous notes where he is
17 trying to go through and see what he's actually getting in
18 response to these different search terms. Again, I wanted to
19 start by clearing up this idea that somehow a list that goes
20 beyond the search warrant itself is somehow inappropriate.

21 THE COURT: Wouldn't it turn on what those words were?
22 In other words, in your hypothetical you said heroin
23 trafficking was the crime for which the government goes to the
24 magistrate and says there is probable cause. Can the search
25 terms be expanded to include searching for -- let's start with

1 other drugs. So marijuana.

2 MR. FERRARA: Yes. Any word your Honor says I am
3 going to say yes, I'll tell you.

4 THE COURT: That's helpful. Pornography.

5 MR. FERRARA: Yes. Now, let me just get right to the
6 heart of that. If you search for pornography and you were to
7 find something that says pornography, you cannot seize it. You
8 have to go get another warrant to seize that. That's the law.

9 THE COURT: I'll keep trying. How about Ferrara?

10 MR. FERRARA: They could search for any word because,
11 again, they have the authority to go through every single file.
12 So no word could return something that they would not be
13 allowed to look at because they could simply go through every
14 single file.

15 THE COURT: But there is a temporal issue. Let's say
16 you do look through every file, based on the scope of the
17 warrant, and that you put it aside. And then three years later
18 you're suspicious of something else. You then go back for what
19 you've already determined is nonresponsive material, in effect,
20 and look for something which is beyond the scope of the
21 warrant. Is that permissible?

22 MR. FERRARA: The law is unsettled. The government's
23 position is that would be permissible. There is no law to the
24 contrary on that, at least that I'm aware of, and this is
25 something we have talked a lot about. I'm not prepared to say

1 that that's inappropriate. We are not conceding that would be
2 inappropriate. We don't think that's what happened here. I'm
3 prepared to talk about what happened with Agent Miller.

4 THE COURT: I'd have to say, it's surprising. Maybe I
5 had not appreciated the scope of the argument. Let's say we
6 have an exceedingly particularized warrant, the results of
7 which includes electronic devices which, as we know and as the
8 Supreme Court has said, may contain as vast and personal and
9 significant information as anything we might keep just in our
10 homes. And the government's theory, as I'm appreciating it,
11 is, we can keep that and we can go back to it for anything,
12 entirely unwarranted to the original warrant and search it and
13 only if we get a hit do we then need to go back --

14 MR. FERRARA: I don't know, your Honor. Maybe the
15 words entirely unmoored get us too far away.

16 THE COURT: You answered any word I threw at you with
17 a yes. Do you regret that answer?

18 MR. FERRARA: No, I don't.

19 THE COURT: Entirely unmoored.

20 MR. FERRARA: Again, the case law just isn't really
21 great on this.

22 THE COURT: We do have an amendment that we have in
23 mind. You don't need a case law to suggest that we can't
24 entirely undo the protections of the Fourth Amendment.

25 MR. FERRARA: I am uncomfortable saying, standing

1 here. I'm not prepared to concede anything, but I'm
2 uncomfortable saying that if your purpose is to go back into
3 the electronic media for something you know is outside the
4 warrant, I'm uncomfortable saying that is necessarily
5 reasonable. I have to think more about it.

6 What I said to your Honor about yes to everything, you
7 are right, I shouldn't assume. What I was assuming in that
8 question was the idea that the agents are acting with the idea
9 of, we are going back to try to find something responsive to
10 this warrant.

11 THE COURT: But it's a problem the way you set it up.
12 Because you want to set it up by saying, they can look through
13 everything.

14 MR. FERRARA: They could.

15 THE COURT: If they do that, then they are making a
16 determination based on the warrant as to what's responsive and
17 what's nonresponsive and then whether physically or mentally
18 there needs to be a distinction, I think, between responsive
19 and nonresponsive such that you can't then search with any term
20 unmoored, entirely unmoored or even a little bit unmoored from
21 the warrant, which I think is what you're proposing. In other
22 words, it doesn't help, I don't think, to your argument to sort
23 of this point which you want to put a lot on, which is that the
24 government could look through it all, but it only must look
25 through it all with the idea of searching for and ultimately

1 seizing responsive documents.

2 MR. FERRARA: Your Honor, that might be right. That's
3 what happened here. And the point about going through every
4 single record is an attempt to respond to what defense counsel
5 suggests must be inappropriate because the terms were outside
6 the scope of the attachment to the warrant. And so, your
7 Honor, I appreciate the hypotheticals and it has tested the
8 limits of my argument. But my argument really is an attempt to
9 respond to the idea that it is not necessarily inappropriate to
10 use search terms outside the warrant itself. And that's what,
11 your Honor, was done here.

12 THE COURT: I think then to move back down to the
13 ground and out of the atmosphere which we are speaking, then I
14 think we have to contend with the inconsistent testimony
15 between Miller and McGuire.

16 MR. FERRARA: I'm happy to turn to that, your Honor.

17 THE COURT: I don't know how to read it other than
18 inconsistent. Then my question to you is, who should I
19 believe? I'm not suggesting misdirection, but sometimes people
20 recall events differently and these two people did.

21 MR. FERRARA: I agree. I think your Honor heard two
22 different witnesses, who neither of whom was super well prepped
23 on this particular point.

24 THE COURT: One, presumably, was prepped.

25 MR. FERRARA: Your Honor, this did not come up in the

1 direct. Your Honor will recall this did not come up in the
2 direct. Again, my observations of Agent McGuire --

3 THE COURT: Agent McGuire was prepped. He had a set
4 of responses which is consistent with the argument that you're
5 putting forward. Ms. Miller was not prepped. She had no idea
6 she was going to show up and it wasn't a fog of memory. It was
7 a specific memory that was inconsistent with what Agent McGuire
8 had testified to.

9 MR. FERRARA: This sort of cuts both ways because on
10 the same -- obviously your Honor controls, but I saw Agent
11 McGuire trying to think through what had happened and
12 re-creating his memory. I think the record reflects that on
13 this point. To your Honor's point about being prepped, he had
14 a better opportunity to think about this than did Agent Miller
15 and she is coming in having thought about it for five minutes
16 and reviewing one e-mail about it.

17 But I guess I want to lead on this with, again, we are
18 not conceding there was necessarily any problem with what Agent
19 Miller -- we are not conceding there was a problem with what
20 she did.

21 THE COURT: The government is not walking away from
22 any of her testimony. I should assume her testimony to be true
23 and accurate.

24 MR. FERRARA: Your Honor, I don't want to make myself
25 a witness.

1 THE COURT: No. That's not the question. The
2 question is whether your argument essentially requires me not
3 to credit, not because of a lack of credibility, but for other
4 reasons, to not credit aspects of her testimony.

5 MR. FERRARA: The government's position is that as
6 between the two recollections your Honor should credit Agent
7 McGuire's because he had more of an opportunity to think about
8 this and was the case agent. No. Our argument is not that
9 your Honor has to credit one or the other. Either version
10 supports our argument that at the end of the day there was no
11 prejudice to Mr. Wey from this research.

12 THE COURT: And where doctrinally am I thinking about
13 prejudice?

14 MR. FERRARA: For instance, defense counsel wants to
15 argue that these documents were used in various ways, etc. And
16 the record --

17 THE COURT: Maybe. Is that the question? Is the
18 question ultimately how they were used?

19 MR. FERRARA: I think it goes --

20 THE COURT: Maybe there are. My skepticism is not
21 heartfelt. I don't know. But as I sit here, I can't sort of
22 think analytical structure, here is where I'm concerned about
23 prejudice.

24 MR. FERRARA: Let me put it this way. Let me attack
25 it from sort of a reasonableness perspective. The government

1 had a situation where it could not access its evidence,
2 essentially, where a review had been done and pertinent
3 documents had been found and we were left with a situation
4 where we had none of that due to a technological problem.

5 The Fourth Amendment can't require exclusion when the
6 government confronts a problem, not of its making, a problem
7 that is entirely technological and attempts, in good faith and
8 reasonably, to address that problem the best way it can.

9 And what your Honor heard here was that Agent McGuire,
10 in order to deal with this problem, and in order to find a
11 subset of documents, asked Agent Miller to run these searches.
12 Now, that's reasonable in the first instance because Agent
13 McGuire himself wanted to separate himself from this search and
14 that's in part because he didn't want to expose himself to
15 privileged information and because he had this idea that he did
16 not want to research or search through everything.

17 Defense counsel calls that -- I believe what he says
18 is that McGuire testified -- this is defense brief at 14: The
19 way defense characterizes it is McGuire testified he understood
20 clearly in 2015 that the FBI was no longer permitted to search
21 the entire database. That's not what the record shows. What
22 McGuire testified was that, that's at Defense 14, at the
23 transcript at 338.

24 THE COURT: Tell me what sentences you're pointing to
25 in the brief.

1 MR. FERRARA: That McGuire understood clearly in 2015
2 that the FBI was no longer permitted to search the entire
3 database.

4 THE COURT: And the quote of the parenthetical is: We
5 decided that in 2015 we could not continue to do searches.

6 MR. FERRARA: Right. The record isn't entirely clear
7 why that is. I think the record has other places the Court can
8 infer. Number one, there were privileged documents in that.
9 As the Court knows, as a practical matter, the government does
10 things in an abundance of caution frequently. And so this is,
11 again, evidence -- this is not evidence of agents doing
12 something improperly. It's evidence that the government did
13 not want to go farther than it had to go in trying to rectify a
14 problem not of its own making. That is to say, we did not want
15 to have our investigative agent run roughshod through the
16 entirety of the electronic tapes. As your Honor said earlier,
17 the law is unsettled. That could have been construed to be a
18 problem. There were privileged materials in the entire
19 universe. Remember, your Honor, those bookmarks also had been
20 lost. All of the bookmarks had been lost.

21 THE COURT: I have not reread the transcript. I do
22 want to understand your argument as to the context of that
23 because in my memory it was a case had come down about length
24 of time of retention. Wasn't that part of the testimony here?
25 There was a specific district court case in mind from the

1 Eastern District.

2 MR. FERRARA: There was *Metter*. I don't remember and
3 I know that Agent McGuire was asked about *Metter*. I don't
4 believe he was asked about *Ganias* in this.

5 THE COURT: I don't mean *Ganias*.

6 MR. FERRARA: *Metter* he was certainly asked about.
7 *Metter* doesn't speak to --

8 THE COURT: Whose opinion is that? Because it was
9 referred to by the judge's name.

10 MR. FERRARA: It was *Irizarry*.

11 THE COURT: Then I have the same case in mind.

12 MR. FERRARA: And so defense wants to call this bad
13 faith. We believe it was good faith because we were taking the
14 most limited steps we could to address a problem that we did
15 not create, so we wanted a filter agent to look through it.
16 Both McGuire and Miller agreed that she was given documents to
17 look for. McGuire says it was a much larger number and he says
18 that she was asked to find just those documents whereas Miller
19 says it was a smaller number that were examples.

20 THE COURT: His testimony was that he sort of showed
21 her documents and said, find comparable documents.

22 MR. FERRARA: Absolutely right and Miller was not that
23 specific.

24 THE COURT: She was given search terms and told to
25 search for those terms, including, and correct me if I'm wrong

1 again -- I have not reread the transcript -- including I think
2 we asked or someone asked the specific, for example, searching
3 for air bag and she remembered searching for Dogan Erbek.
4 That's not even close to Agent McGuire's testimony as to what
5 happened.

6 MR. FERRARA: Your Honor, we are happy to try to find
7 the page where she says she was given some documents as
8 examples, but on the Erbek point, I believe McGuire also had
9 testified that one of the things that they did want her to look
10 for was Dogan Erbek's e-mails, the fact that she heard that
11 name. She construed it as a search term whereas Agent McGuire
12 seemed to put it in the context of, he was showing her Dogan
13 Erbek e-mails. I agree it's inconsistent in the sense of how
14 exactly the search was done, but I think there is an
15 explanation for why she remembered the name Erbek. She
16 remembers it as a search term. I think McGuire also said that
17 he did mention Erbek or at least showed her Erbek e-mails. So
18 she would have had that name in her head.

19 Agent Miller does the search. Now, defense counsel
20 at -- I believe it's his brief at 14 says that Miller delivered
21 the balance of the search materials to McGuire. The word is
22 delivering, which I've called delivered. But in fact she
23 explicitly said she did not deliver the documents she found to
24 anyone on the prosecution team and that's at 379 of the
25 transcript.

1 I'm not going to stand here, your Honor, and suggest
2 that Agent McGuire could not necessarily have looked at those
3 documents that he didn't have access to the database. But what
4 Agent McGuire did say was that her work was not used. He
5 didn't say that explicitly. What he said was that documents
6 were exported based on the original bookmarks and that's at
7 transcript 337.

8 What I'm arguing here, your Honor, is that at all
9 times during this period of time where there was this problem,
10 which was about a two-month period, the government was taking
11 the most limited steps it could to address that problem. And
12 when the bookmarks turned out to have been restored, and it was
13 a glitch, the government did not use what Agent Miller had
14 relied upon.

15 And the Fourth Amendment simply cannot require the
16 exclusion of evidence because the government attempted, in a
17 limited way, to deal with a technological problem. This is not
18 the sort of bad faith that can be deterred. Technological
19 errors cannot be deterred from exclusion and the government has
20 to be able to look at evidence and prepare its case if there is
21 a technological glitch like this. This just can't be the
22 purpose of the Fourth Amendment.

23 Your Honor, my colleague, Ms. Hector, found --

24 THE COURT: For example, could one deterrence be
25 successful if, for example, in the face of after the length of

1 time the technological glitch happens, what was recovered that
2 to the extent that the investigation expanded over that time
3 beyond the original scope of the warrant, you can go back and
4 get another warrant or with respect to an agent who comes in in
5 the context of a tamper -- what did you call it?

6 MR. FERRARA: Filter team, your Honor.

7 THE COURT: Filter team that could be trained on the
8 scope of the warrant. Which testimony was, there was no such
9 training. In other words, I don't know that a technical glitch
10 that seems to me the longer the government maintains
11 information from the time of search, the process that happened
12 here, the sort of chronology of what occurred, it's almost, I
13 don't want to say inevitably, but it's not surprising that
14 something happens that leads, in a sense, to a starting over or
15 a restarting.

16 But the question then is, what steps must the
17 government take consistent with the Fourth Amendment? I don't
18 know that it's right to say or it seems problematic to say that
19 you could bring someone in who has no training on the scope of
20 the warrant, give them search terms that were beyond the scope
21 of the itemized scope within a very, very broad warrant and
22 kind of let them have at it. Again, it seems like even in the
23 face of a technical glitch there has to be some protection from
24 the government just rummaging an untrained, unarrowed person
25 sort of rummaging through, right?

1 MR. FERRARA: Fair enough, your Honor. I just have to
2 push back because the record belies that. Your Honor is
3 correct there was not testimony that there was an extensive
4 training for Ms. Miller on the nature of this investigation.
5 However, I believe they both said that they explained the
6 investigation to her. They gave her, at the very least -- at
7 best for the government Agent McGuire says they gave her
8 specific e-mails and asked her to find them. At worst for the
9 government, she was given examples of e-mails. And that's at
10 transcript 372. She was shown documents in connection -- there
11 were a couple of documents that were shown to me. I was told
12 if I found something similar, that's something they were
13 looking for. She did have this name Erbek.

23 THE COURT: Just to go back, you say there is
24 testimony that they had concluded that Erbek -- let's just
25 focus on this point because it's a helpful example -- was

1 captured. He said captured by the warrant.

2 MR. FERRARA: Yes, your Honor. I don't mean to say
3 that one of them necessarily testified to that exactly, but
4 that was the import of their testimony, was that Erbek was a
5 search term that, yeah, had returned relevant documents.

6 It's hard to imagine how Erbek is not showing e-mails
7 between Mr. Wey and Tianyi Wey and Mr. Erbek discussing the
8 movement of money, financial matters, stocks, how that is not
9 captured by the warrant. So the idea that giving Ms. Miller
10 that name was somehow rummaging I want to push back on because
11 that's not what was happening. It's in Government Exhibit 16
12 where your Honor can see McGuire's handwritten notes as to what
13 sort of responsive documents that would have found. The idea
14 is, Agent McGuire had looked at it. He had looked at the
15 results for Erbek. This isn't the idea that he's saying, have
16 at it, rummage.

17 In fact, and this is what I was sort of thinking is
18 prejudice, but I think goes into the reasonableness argument,
19 was this idea, she didn't find anything new, so it worked. The
20 government's procedure actually worked here, and it didn't
21 result in the prosecution team learning something they hadn't.

22 If I may, your Honor, I also want to turn to this idea
23 of expanding the scope of the investigation. There was
24 testimony and there is evidence that there was discussion, for
25 instance, about tax violations and some e-mails between AUSA

1 Massey and Agent McGuire on that point.

2 First off, again, just to go back, whatever was in
3 Agent McGuire's head when he was searching, what is clear from
4 his testimony is that he was attempting to find documents
5 responsive to this warrant. And at the end of the day there
6 are no tax charges here. The charges here are securities fraud
7 and wire fraud. And so to the extent that there would be a
8 remedy for, for instance, seizing documents that related only
9 to tax fraud -- and I'll come back to that in one second -- the
10 remedy would be if suppressing those documents vis-a-vis a tax
11 fraud violation or the idea that the government had brought
12 some case that it couldn't otherwise have brought because it
13 violated the warrant. That's not what happened here. What
14 happened here was we ended up charging the securities fraud and
15 wire fraud and money laundering and the documents we seized are
16 evidence of those things.

17 Now, that's not to say they couldn't also be evidence
18 of a tax violation and we couldn't properly bring a tax
19 violation in this case. Of course your Honor can see a
20 situation in these sort of financial and fraud crimes where you
21 properly seize a document that is evidence of securities fraud
22 and it also happens to show a tax violation. OK. The
23 government got a two-for-one on that. But that doesn't make it
24 improper.

25 But what I am flagging here is all this talk about the

1 theory of the tax case, etc., etc. There is no tax charge. So
2 whatever remedy might exist would be inapplicable because we
3 are not going to be introducing evidence of tax violations. We
4 are not charging it, etc. So the documents that are going to
5 be relevant are going to be securities fraud and wire fraud
6 documents.

7 Your Honor, I was going to turn briefly -- this is
8 just a minor point on good faith, but I wanted to make it. I
9 think your Honor, in holding this hearing, the government would
10 like to read into that the idea that your Honor understands
11 that good faith can still apply, even if the warrant on its
12 face does not list the statutes.

13 THE COURT: That's unresolved.

14 MR. FERRARA: I think that's *Romain*.

15 THE COURT: I understand. I have read *Romain* and I
16 have read *Rosa*.

17 MR. FERRARA: Defense counsel distinguishes *Romain*.
18 No one is suggesting *Romain* controls this or that there isn't a
19 factual analysis that has to happen. It's simply the idea,
20 there were no statutes on the face of that warrant, and the
21 Second Circuit said we are still engaged in a good-faith
22 analysis.

23 I've covered most of what I wanted to talk about
24 regarding the electronic search and I was going to turn, unless
25 the Court has other questions, I was going to turn just to a

1 few points on the physical search.

2 THE COURT: Go ahead.

3 MR. FERRARA: Defense in its brief asserts that the
4 government called the wrong witnesses --

5 THE COURT: Just a question. Take you back just one
6 moment. On the question, that sort of initial step in the
7 analysis as to whether the Court ought to proceed to a
8 good-faith analysis, is it the government's view that that's a
9 pure legal analysis or could there be evidence from the hearing
10 that would help make -- I don't mean pure legal analysis.
11 Obviously, I have to look at the warrant. But could there be
12 evidence from the hearing that helps resolve the question as to
13 whether or not to engage in the good-faith analysis?

14 MR. FERRARA: I apologize if I'm misunderstanding the
15 Court's question. I think as a legal matter, what *Romain*
16 stands for and *Rosa* stands for is the idea that the Court ought
17 to engage in a good-faith analysis, regardless of the fact that
18 the statutes don't appear on the face of the warrant.

19 THE COURT: There is still the question of whether
20 it's so clearly facially invalid. In other words, you are
21 saying the absence --

22 MR. FERRARA: We are not prepared to say it's clearly
23 facially invalid. That's not actually our argument. We
24 believe that the warrant from the attachments, etc., would make
25 it clear to a searching agent what the crimes that they were

1 arguing.

2 We understand there is law against us that says that
3 it has to be -- on the face we believe that the warrant and its
4 attachments as a whole would make it clear that this was a
5 securities fraud search. But I believe, yes, your Honor, that
6 good faith goes into your Honor's thinking about to what extent
7 the agents relied on the warrant, understood the warrant,
8 despite the fact that the statutes were not listed. And we
9 think in answering that question the Court --

10 THE COURT: I guess maybe I'm thinking of it that
11 there is -- the facial validity question has two components.
12 There is the undisputed absence of the statutes on the face of
13 the warrant itself, on the face of the warrant or included in
14 the attachments.

15 MR. FERRARA: That's correct. 100 percent, yes.

16 THE COURT: Then there is also the question of whether
17 the warrant is so lacking in particularity or overbreadth as to
18 whether or not one could still engage in a good-faith analysis.
19 I think those are separate things.

20 MR. FERRARA: Yes, I think those are separate things.
21 We are pointing to -- just on the reliance on the warrant, we
22 are pointing to things like that the statutes were listed in
23 accompanying documents, which cases talk about. The things
24 like the briefing, the idea that these were securities fraud
25 agents executing the search. That's what we are talking about.

1 That's what we are relying on for the good-faith reliance on
2 the warrant itself.

3 In terms of the execution of the search, this is where
4 defense counsel points to the idea that we --

5 THE COURT: You are at 45.

6 MR. FERRARA: I apologize, your Honor.

7 THE COURT: I want you to do the physical and I'll
8 give extra time to the other side.

9 MR. FERRARA: Very good. Thank you, your Honor.

10 We called the case agent. We called the AUSA who
11 prepared the warrant. We called the case agent at the time of
12 the search, who was also the search team leader, and we called
13 the current case agent, who is primarily responsible for
14 searching electronic evidence. What we are arguing from those
15 witnesses is that the FBI, the government, the team, as a
16 whole, were operating in good faith. We are, of course, not
17 suggesting that some mistakes were made or certain things
18 weren't seized. We conceded certain things, like the x-rays.

19 What we are arguing is that those are good-faith
20 mistakes that we had a situation where the team did everything
21 it could to try to avoid mistakes like that in a context of a
22 appropriately broad warrant.

23 So, again, I don't want to go through all of these
24 things. Just the idea that the case agent was on the scene
25 taking questions, trying to look at what agents had taken, that

1 the AUSA goes over and explains it, takes that extraordinary
2 step. This isn't the sort of conduct we want to deter. We
3 want to encourage all of those things. In a case where there
4 is appropriately a very broad warrant, the government was going
5 above and beyond to try to make sure that the search was done
6 appropriately.

7 That's all I have, your Honor.

8 THE COURT: Thank you.

9 MR. SIEGAL: Good morning, your Honor.

10 THE COURT: Good morning, Mr. Siegal. We will give
11 you 50 minutes.

12 MR. SIEGAL: Thank you very much, your Honor.

13 THE COURT: If you need it.

14 MR. SIEGAL: I'm sure that I will, your Honor.

15 THE COURT: I've come to know you.

16 MR. SIEGAL: Yes.

17 Your Honor, I have three large points to make, large
18 buckets to make. I am going to start where your Honor and
19 Mr. Ferrara started which is with what we learned almost by
20 accident from Agent Miller on the witness stand on the second
21 day of the hearing which, in our view, is the clearest
22 demonstration that good faith cannot save -- no argument for
23 good faith can save these warrants.

24 The government wants to make an argument, which I'll
25 get back to, that good faith is demonstrated by the fact that

1 the agents were from a securities fraud squad. They had been
2 briefed on what the affidavit said.

3 THE COURT: The operational plan.

4 MR. SIEGAL: All of that totally goes out the window
5 when Agent Miller comes onto the scene in 2015, three years
6 after these searches or three and a half years after these
7 searches. She hasn't read the warrant. She wasn't at the
8 briefing. She is not on the securities fraud squad.

9 And what does she do at the instruction of Agent
10 McGuire two weeks before they present the case to the grand
11 jury? She does wide-sweeping searches for a number of search
12 terms. She doesn't remember all of them. There appears to be
13 no record of what searches she ran. We do know she included
14 Dogan Erbek as one of those searches. We know she was also
15 asked to find documents similar to two or three examples she
16 was shown by Agent McGuire. And she ran that search through
17 the entire electronic database, not through the 105,000
18 documents that Agent McGuire had marked as responsive to the
19 warrant in 2013, but rather through 3 million items. You can
20 see that on the FTK report and she said that. She read it
21 across the entire database. There is really no dispute about
22 that fact.

23 And that is the harm that is identified in the first
24 *Ganias* opinion of Judge Chin which, by the way, the Second
25 Circuit didn't reverse all that logic or throw all that logic

1 out. What the Second Circuit said was, because in *Ganias* the
2 agents actually went back and got a new fresh warrant and acted
3 upon that fresh warrant that wasn't attacked for its lack of
4 particularity, that was effectively the intervening event that
5 gave them good faith to act.

6 Now, there is a large portion in *Ganias II* of dicta
7 that describes a theory on which the government can hold onto
8 the entirety of electronic evidence seized, and Mr. Ferrara is
9 asserting that analysis as fact in this case.

10 Let's start off with the first thing, which is, they
11 didn't put any evidence on before your Honor in this case about
12 what the reasons were for keeping all that data that they
13 thought about that reasoning. *Ganias* actually itself says, we
14 can't rule on this issue because none of that is in the record
15 below.

16 But let's put all that aside and let's give the
17 government the credit here and say, let's assume they made a
18 presentation that you could retain the entirety of the
19 electronic seizure for purposes of maintaining evidentiary
20 purity and the ability to do some sort of chain of custody
21 analysis if you had to on the back end.

22 That isn't what the problem is here, your Honor, and
23 nothing in *Ganias* says that you can keep 27 hard drives until
24 the end of time to fix technological glitches you might come up
25 with five years later. *Ganias* doesn't say anything like that,

1 assuming that's all that happened here, is that they were
2 fixing technological glitches which frankly I think is not
3 clear on the record at all. That's what Mr. McGuire said. We
4 only know that what Mr. McGuire says and what Ms. Miller say
5 are two different things. And Mr. McGuire quite frankly --

6 THE COURT: Not on the question of the
7 inaccessibility --

8 MR. SIEGAL: No. I agree. That was the impetus for
9 doing the search. She doesn't seem to contest that and she
10 doesn't testify to that at all.

11 But what we do know she ran these blanket searches.
12 She is an agent that didn't have any of the supposed good-faith
13 basis.

14 THE COURT: Their response is, but she ran searches
15 that were given to her by an agent fully versed in the
16 limitations of the warrant and the specific crimes under
17 investigation. What's your response to that?

18 MR. SIEGAL: I have two responses to that.

19 First of all, our position, of course, is that the
20 warrant didn't allow them to search for items related to Dogan
21 Erbek. We don't know what else they searched for because she
22 can't recall and there is no record of it.

23 Second of all, it's not just search terms that he gave
24 her. He told her to find documents similar to this, according
25 to her, according to what she did. We have no idea what she

1 found based on that, where she found it, or what items were
2 marked by her versus by Mr. McGuire two years earlier. In
3 fact, although Mr. Ferrara asserts that she found the same
4 items, in fact, we have no idea and the CART agent, Mr. Blum,
5 testified on the witness stand that he would be unable to
6 figure out which items had been marked by Agent Miller versus
7 by Agent McGuire because the system just doesn't allow for that
8 kind of data integrity at this stage. What we have here is the
9 full-blown vision of what *Ganias* 1 said was a constitutional
10 problem experienced in this case.

11 Now, it's just not simple enough to say, well, she was
12 just acting as a proxy for McGuire. Even if she was, McGuire
13 knew because *Ganias* had been decided in 2014, the original
14 *Ganias* opinion. He knew that. He said it on the witness
15 stand. He knew we couldn't be doing the searches. In fact,
16 that's basically why he had her do the searches.

17 THE COURT: What do I look for in the record for that
18 proposition? Wasn't his testimony a taint question?

19 MR. SIEGAL: There was that concern, yes, but he knew
20 she had to search through the whole database to do that.

21 THE COURT: You are saying that the record supports a
22 finding that he specifically put her to the task of kind of
23 rummaging through these documents because he knows he can't do
24 it, but she and the -- what's the theory?

25 MR. SIEGAL: I'm saying clearly he was concerned about

1 him being the person doing the search and, yes, there was a
2 concern about privilege. But *Ganias* existed at the time. It
3 was a Second Circuit case. It says you can't be running new
4 searches. I think it's extrapolatable from the testimony that
5 that was part of the concern here.

6 Now, we don't know definitively, but the agents are
7 charged with knowledge of a Second Circuit case that you can't
8 go doing new searches three years after you seized these items
9 and two years after you've done your initial cut of what is or
10 is not supposedly responsive to the warrant.

11 The law is, and this is why we cite *Thompson* and
12 several other cases that effectively say this, you get a search
13 warrant to go into somebody's house and somebody's office and
14 you take what is responsive to that search warrant. Now, there
15 is an exception made for electronic materials that are so
16 voluminous that you can't realistically do that on site.

17 So what the law allows is you get to take that
18 electronic stuff back and then decide what is and what is not
19 responsive. Once you have done that you don't get to keep that
20 stuff for the rest of time to continue to do new searches any
21 more than they could decide in 2015, you know what, we lost all
22 the documents that we made but we made copies in your
23 apartment, so we have the search warrant from 2012. We are
24 going to come back to your apartment, get those originals again
25 and research them. They would never be able to be allowed to

1 do that. They would need to get a fresh warrant.

2 Mr. Ferrara argues that they did everything reasonably
3 that they could to deal with a problem that they encountered in
4 2015 except the one thing they didn't do was the thing that the
5 law requires them to do, which is go get a fresh warrant. Go
6 get a warrant. Say, we have the stuff. That's what they did
7 in *Ganias*, which --

8 THE COURT: Let me play with the hypo. If you do a
9 physical search, take responsive documents, you leave, you lose
10 those documents. Say you lose them the next day. You have to
11 get a new warrant or go back with the same warrant?

12 MR. SIEGAL: All warrants get 10 days.

13 THE COURT: Set for a period of time.

14 MR. SIEGAL: They give 10 days to do that search. My
15 answer to that is, if you lose your search materials after six
16 months or whatever, yeah, you got to get a new warrant. You
17 can't go back to somebody's house. Frankly, I think it would
18 probably be a constitutional problem to do a search, take what
19 you think is responsive, and then go back the next day to see
20 if there is anything more. I think that would be the problem.
21 But that's not the case we are facing anyway.

22 What I'm saying is, this is three and a half years
23 later and they are going back to the well to solve their
24 technological problem, even if that's all that they were doing.
25 It's not all that they were doing.

1 The proof in this case is simply not that she did what
2 McGuire wanted to believe happened. I don't know why their
3 testimony diverges. What we do know is, you are right, he was
4 prepped. He understood what the issues were and what the
5 dangers were in this hearing, and she didn't. We found out
6 what she had to say almost by accident.

7 And what she says is, no. What I was asked to do, I
8 was asked to run a bunch of searches of terms. I don't
9 remember what they were. There is no record anymore of what
10 they were. Somewhere between 50 and 150 documents come back as
11 a result of her searches that she flags. And that includes not
12 just running search terms, but also find me documents that are
13 similar to these two or three. That could be anything.

14 We have an FTK report that has both her name on it and
15 his name on it that counts, I think, 127 or 172 items that the
16 government cannot discern which ones were flagged by her, which
17 ones weren't. That's dated September 2. That's six days
18 before they present this case to the grand jury. We know that
19 the reason that McGuire sent her to do that exercise was to
20 gather materials for the grand jury.

21 Even the notion that there is no taint here, no
22 prejudice is absurd because we know from the record that there
23 clearly is. Even if we didn't know that, it doesn't matter.
24 What matters is the harm of the government going in and doing
25 those searches in 2015 without getting a new warrant.

1 A, that's a harm.

2 THE COURT: Let me ask two questions. One, McGuire's
3 testimony is, look, yes, these are new terms, take the name.
4 We learned in the course of the investigations things that led
5 us to believe rationally and reasonably that if his name shows
6 up it will be responsive with information to the original
7 warrant, right? That tells a story about why a expansion in
8 fact is a kind of narrowing. We are able, with the information
9 we have, to be able to search in a way that's going to get us
10 to documents that go to the story of the crime that's told in
11 the attachments to the warrant. What's wrong with that?

12 MR. SIEGAL: This requires me to step back in time a
13 little bit to 2013 and to talk more specifically about Agent
14 McGuire's testimony on this issue because remember that McGuire
15 is adding the search term Dogan Erbek and a bunch of other ones
16 that are not on the original Exhibit B list at the direction of
17 AUSA Massey, who although McGuire wasn't the case agent during
18 the ensuing year and five-month period, AUSA Massey was.

19 In the interim, AUSA Massey is conducting proffers.
20 He is expanding his theories of investigation. He is issuing
21 and getting subpoenas returned. He is having all sorts of new
22 information that he's importing into his thought process about
23 what is or is not going to be interesting or important to him
24 from this trove of electronic materials that hasn't yet been
25 looked at.

So McGuire doesn't testify, does not testify that he looked at each and every one of the documents that hit on, for example, Dogan Erbek or Amare Shantal or EST and determined that each of those otherwise had terms in it that are covered by the original warrant. What he testifies to is --

THE COURT: What page?

MR. SIEGAL: This is on page 289.

THE COURT: OK.

MR. SIEGAL: He says: I think with few exceptions.

THE COURT: Line 18?

MR. SIEGAL: I'm sorry. Line 18, your Honor.

THE COURT: Go ahead.

MR. SIEGAL: I think, with few exceptions, if I

determine that it was a good search term and that the documents were responsive to that search term, I would tag all of them.

What he testified to was, he put Dogan plus Erbek in the system and if he looked at those documents and the document said Dogan Erbek together in some way that was clearly responsive to the search, the search term he just ran, they marked all 72 documents that were a hit and is responsive. He said specifically, I can't say that I looked through every one of them.

Later in his testimony he said, I looked to see if they were responsive to the warrant. But in this context that phraseology really has no meaning because what does it mean to

1 be responsive to the warrant? The agents have testified to
2 many different things about what was responsive to the warrant.
3 Is it just the list in Exhibit B? They didn't really testify
4 to that, and they took plenty of things -- unless you say they
5 happened to be in Ben Wey's apartment, the agent testified we
6 were looking for things related to securities fraud, or we had
7 a general sense of what the investigation was about.

8 In this particular case, before McGuire even begins
9 doing these search terms, he asks for a top five list of legal
10 theories and gets a very lengthy digest from David Massey about
11 what this investigation is about. When McGuire says, I was
12 looking for things that were responsive to the warrant, does he
13 mean, I was looking for things that fit into one of the
14 theories that David Massey was saying to me in that e-mail of
15 top five theories? Was he saying things that might be
16 responsive to a tax fraud theory? Was he saying things that
17 might be responsive to things that Robert Newlin had said in
18 his proffers in the fall of 2012, six months after these
19 searches?

20 This is part of the problem we have here, your Honor,
21 which is, they don't get to start doing the culling of what is
22 or what is not quote/unquote responsive to these warrants until
23 15 months afterwards.

24 And you would never be able, again, to go back into
25 somebody's apartment 15 months later after your investigation

1 has developed and say, you know what, now we are going to
2 decide what's responsive to the warrants and we are going to
3 get to look for things with a hundred terms beyond what were in
4 our Exhibit B. If there is any limitation at all to the
5 warrants, and we don't think really there are, it has to be
6 what's in Exhibit B. It has to be that that's the limitation.

7 David Massey tried to soften this a little bit by
8 saying, you know, we added e-mail addresses for some of these
9 names, but that's not the issue. The issue is, they added a
10 whole bunch of names of people. And, remember, Exhibit B is
11 not just a list of every name they could possibly think of at
12 the time they issued that warrant. We know from the record
13 that David Massey and Matthew Komar were discussing the
14 Ungermands, they were discussing Erbek in e-mails two weeks
15 before they get the search warrant. And they did not include
16 those names on Exhibit B. Why? Because they knew they didn't
17 have probable cause. They didn't know what that had to do with
18 anything.

19 And here they are in 2013 saying, you know what, throw
20 these names into the mix, too. That's the problem, your Honor.
21 The problem here is that the AUSA and the agents had a
22 curiosity and they got all this stuff and they wanted to throw
23 everything in there to see what they could find. And adding
24 100 or 150 search terms -- and Mr. Ferrara is correct, your
25 Honor. The law doesn't require one to use search terms or not

1 use search terms. And, yes, could they have looked at every
2 single document? They could have. The problem is, what are
3 they marking as responsive? Sitting here today, all we know is
4 is that Agent McGuire said he marked things as responsive if
5 the search term was a valid search term. So that means the
6 105,000 documents that are responsive to the warrant could very
7 likely include all sorts of documents that don't have any other
8 name from Exhibit B on it.

9 The exercise that Mr. Ferrara is assuming happened,
10 which is not demonstrated in the record, we don't know if
11 that's what happened at all. And the problem is, that list,
12 David Massey has expanded that list to cover all sorts of
13 things that he didn't have PC for. They just added them. And
14 they would never have been able to do that if they didn't take
15 and keep these computers and electronic materials for 15
16 months.

17 THE COURT: Are we still in bucket 1?

18 MR. SIEGAL: Sort of. I've mixed my buckets. Yes, we
19 are in bucket 1. I'll move on to bucket 2, which is the whole
20 notion of good faith here. Your Honor has not had a chance to
21 read our brief. And obviously --

22 THE COURT: I did read your brief.

23 MR. SIEGAL: Our first point in the brief is -- I
24 apologize, your Honor.

25 THE COURT: I just said that I usually limit oral

1 argument to sort of precise questions I have. But given that
2 the briefs just came in and I'm on trial, I wanted to give you
3 some more room to speak to kind of allow me to develop those
4 more precise questions.

5 MR. SIEGAL: Let me talk a little bit more about the
6 point that I make in my brief about why good faith doesn't
7 really even make sense in this context. I'll come back to *Rosa*
8 and *Romain* in a minute.

9 What the cases say is that when you have a warrant
10 that on its face is facially unparticularized, no reasonable
11 agent can rely on that warrant and, therefore, you can't have a
12 good-faith analysis. George says this.

13 THE COURT: The facial flaw that you're pointing to,
14 you heard the colloquy with the government. There is the
15 undisputed absence of the crime, right?

16 MR. SIEGAL: That's right, your Honor. There are
17 multiple reasons. Basically, every box you could tick on what
18 suggests a lack of particularity is present in these warrants.
19 So it isn't just the fact that the code sections are not
20 listed.

21 This warrant says on its face, go search the offices
22 of New York Global Group and you can take any of these
23 multitude of these types of records as long as they relate to,
24 concern, or were used by or used in connection with New York
25 Global Group, Inc. How is that not a warrant to take

1 everything?

2 I'll talk in a minute about the whole issue of the
3 all-records exception. One thing we do know is, that
4 all-records exception doesn't apply to a home. And they go to
5 the home of Benjamin Wey and Michaela Wey, and the warrants say
6 the same thing. Go to this home. They know it's the home of
7 Benjamin and Michaela Wey. Whose names are on that list?
8 Benjamin and Michaela Wey, two of the first five names. That
9 right there doesn't cabin the discretion of these agents at all
10 with respect to what they can take from Benjamin and Michaela
11 Wey's home. That is our primary argument on why these warrants
12 on their face failed the Fourth Amendment --

13 THE COURT: Wasn't that a primary argument while the
14 warrant of the home fails on its face? Isn't that an argument
15 for why the warrant for the home fails on its face? Don't they
16 need to be analyzed distinctly?

17 MR. SIEGAL: They do, your Honor. But I think so far
18 the argument applies with equal force to both of them. Again,
19 there is this all-records exception that I'll get to with
20 respect to the offers, but I'm saying, that doesn't apply to
21 the home at all. Even assuming that argument has any merit,
22 which I will argue it does not, it's not even in play with
23 respect to the home search.

24 My point is, you have this, go search and seize any
25 documents of the occupants of the places you are going. They

1 have no time frame limitation at all in them. They don't say
2 the code sections. They don't describe any type of conduct
3 that these agents ought to be relating their seizing of
4 evidence to. They include blanket language like including but
5 not limited to in several of those passages relating to types
6 of records they can seize.

7 You see in the case law, your Honor, cases that deal
8 with each of these types of flaws and find that warrants --
9 they failed for particularity on each of those issues. But we
10 have got them all. Every way in which you could look at these
11 warrants tells you that they fail for particularity for each of
12 those reasons. So our argument is not as it was in *Rosa* and
13 *Romain*. They failed to put the statute code sections on the
14 face of the warrant and this is some technical glitch that they
15 messed up on and therefore -- this is a core fundamental
16 problem with these warrants from top to bottom.

17 And what *George* says and what *Zemlyansky* and frankly
18 *Rosa* and all the other cases say is, good faith can't overcome
19 that. But let's assume for a moment that good faith could
20 overcome that. Our first argument is good faith doesn't really
21 play here. But as I thought about this, and I say this in our
22 brief, but I am going to say it a different way here, what does
23 good faith mean in this context? The test in *Ganias* says that
24 agents act in good faith when they perform searches in, quote,
25 objectively reasonable reliance on binding appellate precedent.

1 So the question is, what binding appellate precedent
2 have these agents testified to or did Mr. Ferrara argue they
3 were relying on in terms of going ahead with this warrant?
4 Were they relying on some binding precedent that says, you can
5 rely on the affidavit for particularization in place of the
6 warrant? No.

7 They clearly couldn't have been relying on that
8 because *Groh v. Ramirez*, United States Supreme Court, says you
9 can't do that. Were they relying on the notion that a
10 generalized briefing could suffice with particularity? No.
11 Because the law doesn't say that either.

12 *Groh* or *Zemlyansky*, were they relying on the notion
13 that because they were in a securities fraud squad that
14 presented them with sufficient definition of what these
15 warrants allowed? Of course not. There is no case that says
16 anything like that. Were they relying on the fact that the
17 word fraud appears in paragraph 9 of the 12 enumerated
18 paragraphs? They couldn't have been relying on settled
19 appellate law that says that's appropriate because all the
20 cases say the opposite.

21 In fact, if you look at *Vilar*, Judge Karas rejects
22 that same argument. There was a reference to fraud schemes in
23 the *Vilar* warrant. That's totally insufficient. The *Roche*
24 case says reference to mail fraud is totally insufficient to
25 provide particularity. The *Cioffi* case out of the Eastern

1 District rejects this argument out of hand. They are clearly
2 not relying on that.

3 What are they really saying is their good-faith
4 argument. What they are saying is, we relied on the notion
5 that we got this briefing and there was an affidavit that was
6 detailed. What they are trying to do, your Honor, is
7 effectively reargue *Groh*. There is a case *Bianco* that said the
8 law in the Second Circuit used to be that you could refer to
9 specifics in an affidavit that weren't incorporated into the
10 warrant and *Groh* throws that out. And all the cases subsequent
11 to that basically say that *Groh* has been abrogated.

12 What they are trying to do is re-enable them to use
13 the argument that was rejected in *Groh* by couching it in this
14 rubric of good faith. That's just not what the law allows.
15 The law doesn't allow them to supply the particularity that is
16 missing in the warrant itself, which is frankly what the
17 Constitution says and that is one of the reasons why *Groh* ruled
18 the way it did and they are trying to say, we get the benefit
19 of the argument that's been rejected in this circuit. It's
20 gone. They can't make that argument just by back-dooring it
21 through the rubric of good faith.

22 THE COURT: You said you would address *Rosa* and
23 *Romain*.

24 MR. SIEGAL: I sort of already have. *Rosa* and *Romain*.
25 One thing I would say, your Honor, is when you go back and you

1 read these cases, this case has everything to do with
2 *Zemlyansky* and *Vilar* and *Cioffi* and nothing to do with *Romain*
3 and *Rosa*.

4 Rosa is a case where they are investigating a child
5 porn situation. They have to run and get a search warrant
6 overnight between 2 and 5 in the morning, and they failed to
7 put the statutes on the face of the warrant. The Court
8 basically rules, that was an inadvertent bit of momentary
9 negligence. In fact, I think it's *Vilar*, but it might be
10 *Zemlyansky*, they say *Rosa* is distinguishable for this very
11 reason. Here, we asked the agent and the AUSA and they told us
12 they had months and months and months to prepare this warrant.
13 This was not a situation of some overnight glitch.

14 In addition, both *Rosa* and *Romain* are situations where
15 one agent is the same person who wrote the affidavit, knew what
16 the investigation was about, and was the person who did the
17 execution of the search. That's just not the case here.

18 Was Agent Komar on the scene? Yes. Was he available
19 to answer questions? I suppose he was. Did he answer any
20 questions? It's not clear that he answered any or maybe he
21 answered one where somebody said, should I take these duplicate
22 letterheads or these duplicate pamphlets? That's hardly the
23 same thing as saying, the agent who swore out the warrant for
24 child porn and is looking through some computers for child porn
25 knows that's what he's doing and acting appropriately. Here,

1 they didn't put on any of the other 19 agents who did the
2 searching or, frankly, who seized almost all the stuff that was
3 seized. We don't know what any of those people were thinking.
4 We don't know --

5 THE COURT: This is off point. Do we know from the
6 record if the agents who searched the office are the same
7 agents who searched the home?

8 MR. SIEGAL: I think it's significant overlap. There
9 is 20 agents who searched the office and 15 who go to the home.

10 THE COURT: Is that 15 a subset of the 20?

11 MR. SIEGAL: I think so. I have not done that
12 one-to-one comparison, but it looks like it.

13 THE COURT: It was a digression. Go ahead.

14 Is that the end of bucket 2?

15 MR. SIEGAL: Well, let me think about that for a
16 second, your Honor. No, it isn't and here is why. This is
17 part of the theme of my brief which is, this is the fundamental
18 problem with trying to have a good-faith analysis in the face
19 of an unparticularized warrant, which is, what does it mean?
20 What does it mean to be acting in good faith under these
21 circumstances?

22 The point of the Fourth Amendment particularity
23 requirement is that there is a judge who has made an objective
24 judgment about what there is PC to be searching for and has set
25 guidelines and parameters that cabin the discretion of a bunch

1 of agents.

2 This whole notion of a good-faith analysis in the way
3 that the government has presented it here allows them to define
4 on their own what the scope of the search is; and not only do
5 to do that, but to do it five years later with the perfection
6 of hindsight to justify what they took.

7 And so that's why we have testimony where the agents
8 are saying things like, well, sure, we can seize a document
9 showing Michaela Wey was on the tennis team at Oklahoma
10 Methodist University because it shows where, how she and Ben
11 Wey met. Where was that on the search warrant? That's just
12 rank post hoc justification for what they seized because they
13 were interested in it.

14 Or an argument that we can seize any piece of paper
15 that shows an expenditure of money because we didn't know where
16 their money was going. Or to say, you know, their finances
17 were a matter of interest to us because it was unclear. David
18 Massey effectively acknowledges what was going on here, which
19 is, Mr. Wey was making a lot of money. We didn't know where it
20 was coming from. And this is infused through the testimony.

21 THE COURT: The other argument you're making is, don't
22 look at those post hoc rationalizations as evidence of a lack
23 of good faith. What that does is expose why good faith ought
24 not be the lens in the face of this level of lack of
25 particularity and breadth. Is that bracket 2?

1 MR. SIEGAL: Yeah. That's the reason why I'm raising
2 it here, your Honor, that's right. In other words, that just
3 show why a good-faith analysis of this sort doesn't make any
4 sense.

5 THE COURT: I asked the government this question. In
6 a sense you are saying I should look to evidence that emerged
7 from the hearing in part to make this sort of preliminary
8 conclusion. You think it's appropriate to look at the evidence
9 from the hearing to make a preliminary conclusion under *Groh*?

10 MR. SIEGAL: I think that's right, your Honor.

11 THE COURT: That's what are you are arguing from. You
12 are arguing from evidence from the hearing. I think you are
13 making an argument from the evidence from the hearing as to why
14 under *Groh* I ought not engage in a good-faith analysis.

15 MR. SIEGAL: That's right, your Honor. That's one of
16 my points. I have a separate point.

17 THE COURT: We have a bucket to go.

18 MR. SIEGAL: My point is, good faith makes no sense in
19 the way that the government has presented it here. There are
20 certain instances where good faith can be an issue where you
21 can say, well, as was said in *Leon*, we have a warrant that was
22 found to be technically defective because it used any and all
23 language and these agents couldn't have known that a warrant
24 would fail for that weirdo technical reason, so we are not
25 going to penalize them. But that's not what they are arguing

1 here and they can't argue that here because this warrant fails
2 for every conceivable reason that a warrant could fail.

3 Now I'll move --

4 THE COURT: Bucket 3.

5 MR. SIEGAL: Let me find it, your Honor, please, for a
6 moment.

7 So the third point is, let's take their argument on
8 its merit, which is that there could be a good-faith concept
9 here where although *Groh* and *Rosa* and *George* say you can't take
10 what's in an affidavit and say, well, the knowledge of that
11 somehow saves us from the particularity problem. Their point
12 is, they all had the affidavit. They knew what it said. They
13 knew what the investigation was about. That fails for a number
14 of reasons.

15 First of all, there is no evidence that 20 agents read
16 that affidavit. There is no evidence that anybody other than
17 Komar himself read that affidavit before they did the search.
18 Even McGuire, who testifies he read the affidavit, can't say
19 whether he read it in 2012 or, more likely, 2013, when he takes
20 over the case.

21 THE COURT: Isn't the idea of the operation plan in
22 the briefing to basically distill the information in the
23 affidavit?

24 MR. SIEGAL: Well, I suppose it could be, your Honor,
25 but David Massey doesn't recall what he said. It's a 97-page

1 affidavit. He didn't read that affidavit to them in 45
2 minutes. And all the agents testified that there was about a
3 45-minute meeting. In addition, they are talking about
4 logistics for some portion of that meeting. Who knows.

5 And there is no evidence that it was even e-mailed to
6 people, even though Agent Komar suggests he might have done
7 that. He doesn't actually say he did do that. He said he
8 might have e-mailed it to people. In fact, the record reflects
9 that they were unable to find any such e-mail. So the notion
10 that 20 agents understood from the affidavit is out the window.

11 So your Honor points out, there is an ops briefing.
12 Look at that ops memo. Most of it is about logistics, about
13 who is going to what when. There is like three sentences in
14 there about what this is about. If you say, OK, fine, that's
15 what this search is about, it's about securities fraud, pump
16 and dump, and reverse mergers of Chinese companies, how does
17 that justify half of the stuff we talked about and half of the
18 stuff that was sitting in this courtroom? How does it justify
19 adding to the search concept in 2013 tax fraud issues, an IRS
20 agent into the mix, issues relating to Dogan Erbek that are
21 clearly excluded. There is a prescription for erythromycin.
22 I'll go back to this. He said that was an expenditure.
23 Benjamin Wey's 1998 divorce papers. How does that relate to a
24 pump and dump of a handful of companies between 2007 and 2012?
25 It doesn't. On their own theory this falls apart. We

1 understood this was a securities fraud case by a securities
2 fraud squad. How does that match up with taking photos of farm
3 animals?

4 THE COURT: Isn't the structure there and the law --
5 there can be some overbreadth. There can be mistakes. Some of
6 it was explained as mistakes. Some of it was rationalized, was
7 within the scope. But the emphasis here is sort of what
8 processes were in place on an admittedly broad warrant, so they
9 are pointing to the processes as evidence of the good faith.
10 There was this operation plan. There was this training. There
11 was the agent who recalls e-mailing the affidavit. There was
12 his presence on the scene answering questions, being
13 responsive. Letterhead, no. So they are pointing to these
14 processes and, yes, you'll be able to point to examples of
15 overbreadth, some of which, again, there is rationalizations,
16 materials contained in the trash can, for example. Yes, you
17 are going to find prescriptions, for example, but it was --
18 they took it all because it was food and torn documents and the
19 like. In that light, each of the pieces -- I don't know -- add
20 up. I think your argument is that it's all of them. But there
21 is stories to be told about each of them.

22 MR. SIEGAL: Let's talk about the process. I'm going
23 to put aside the garbage issue because, as your Honor may see,
24 we have binders here of examples that are not --

25 THE COURT: That's your supplemental.

1 MR. SIEGAL: We have hundreds of pages here that are
2 not from the garbage that include photographs of open fields,
3 they include PSAT scores, they include all sorts of random
4 stuff. Some of the decisions --

5 THE COURT: From the home.

6 MR. SIEGAL: From the home. Some of the decisions
7 talk about the fact that although there is a potential for
8 overseizure, there wasn't any in this case. But in this case
9 there clearly was. Let's talk about one of the excuses they
10 gave which is that Michaela Wey was supposedly complaining that
11 they need to get out of there quickly.

12 As we point out in our brief, your Honor, and you can
13 see this in the photographs, there is really one closet that
14 has any documents, and that closet had 15 or 16 boxes of
15 documents. And then there is another room that has maybe three
16 or four and you can see from the before and after photos that
17 basically they take every one of the boxes. They leave one or
18 two. Just think about the timing.

19 THE COURT: You calculate in your brief the number of
20 agents and the time that they are there.

21 MR. SIEGAL: They had 15 agents there. And most of
22 those boxes are not full. They had 15 agents. And they are
23 saying to your Honor they can just take the entire box because
24 they found a document in there that has some financial records
25 in it.

1 THE COURT: I suppose that nobody wants agents
2 searching their home for too long. I'm presuming most home
3 searches where people are present, that sort of creation of
4 exigency exists.

5 MR. SIEGAL: But they were there for four and a half
6 hours, your Honor. They weren't in a big hurry to get out of
7 there. They wanted to get home because it was 9:00, I'm sure.
8 But four and a half hours is plenty of time to look through 15
9 boxes with 15 agents and to just grab a box. They grabbed
10 everything and they sifted through it and they still have it
11 all. They still have Michaela Wey's x-rays. That's one of the
12 few things they agreed they shouldn't have.

13 THE COURT: Have you made an application for the
14 return of the x-rays or other materials?

15 MR. SIEGAL: We asked for stuff back, your Honor, in
16 letters that were written to the prosecutors back in 2012. The
17 case frankly went dry, but I can tell you that Michaela and Ben
18 Wey would have loved to have their family photographs back.
19 They don't have them. What they have now are images that
20 aren't really useable.

21 THE COURT: You did ask for those materials.

22 MR. SIEGAL: They are in the record, those requests.

23 The other thing they try to say in sort of their
24 good-faith argument is, well, at the very least, it was clear
25 this was not a narcotics investigation, this was not a child

1 porn investigation. Yet, they are taking materials in a way
2 that shows that they have the desire to take everything. If
3 this isn't a child porn case, why are they taking every SD card
4 that's got every photograph of his family from his apartment?
5 What are they doing taking a Betamax videotape format cassette
6 which Betamax went out of style 20 years ago? Those machines
7 don't even exist anymore. Yet they take that tape.

8 What does it mean to say, we knew this was not a child
9 porn investigation if that doesn't cabin what you are taking in
10 any way? They say, we knew this wasn't a narcotics
11 investigation, but David Massey sat up here and said, if it had
12 NYGG printed on it, they could take a heroin baggy. That's
13 completely incoherent testimony.

14 THE COURT: Are you out of buckets?

15 MR. SIEGAL: No. But I'm getting there. I would like
16 an opportunity to respond to some of Mr. Ferrara's other
17 arguments.

18 He refers to the *Herring* case and whether or not this
19 is the kind of activity that's deterrable. First of all,
20 *Herring* is a completely different case. That is a case about
21 whether or not an agent could execute an arrest warrant that
22 appeared in a computer system database that appeared to show
23 that arrest warrant was still pending from a neighboring county
24 and he goes and executes that search warrant.

25 And what they said was, you know, he had a right to

1 rely effectively on that database being accurate to make that
2 arrest and therefore the arrest wasn't inappropriate. That's
3 *Herring*, which, by the way, is distinguished in some of the
4 other cases we have cited. I think *Zemlyansky* and *Cioffi* are
5 among them. That's a good-faith analysis. Again, it relates
6 to a technical issue that shouldn't overween somebody's acting
7 reasonably in the face of something they are seeing on a screen
8 in front of them.

9 We also know from *George* and *Zemlyansky* and *Vilar* that
10 executing a facially invalid search warrant is deterrable and
11 important to deter. And that's all your Honor needs to know
12 about whether or not this is the type of activity that is
13 subject to the exclusionary rule. *Herring* is just totally
14 inapplicable to this situation.

15 THE COURT: Let me ask, and I will give the government
16 some rebuttal time. You could think of these as remedial
17 questions. Question No. 1. If I were to think there is a
18 distinction between the office search warrant and the home
19 warrant and search, what then remedy wise?

20 MR. SIEGAL: Look. Obviously, our point is everything
21 ought to be --

22 THE COURT: Understood.

23 MR. SIEGAL: I think your Honor can rule that even if
24 the search warrant for the office was valid, the search warrant
25 for the home was not and everything from the home ought to be

1 suppressed.

2 THE COURT: Somewhat relatedly, if you harken back to
3 bucket No. 1, you started by saying, sort of focusing on what
4 happened with Agent Miller is critical. Let's say I agree with
5 you. Here is an instance that demonstrates some lack of good
6 faith. How do I think remedially about the question -- you
7 have shown one instance of bad faith. What then follows from
8 it?

9 MR. SIEGAL: Well, I certainly think anything relating
10 to Dogan Erbek ought to be suppressed.

11 THE COURT: There needs to be some sort of remedy
12 analysis that did what? And how would it proceed?

13 MR. SIEGAL: Our point, your Honor, is, the execution
14 of a facially unparticularized warrant that seized all sorts of
15 things that are not covered by the warrant means the whole
16 search has to be suppressed.

17 THE COURT: I understand that. I went back to bucket
18 No. 1, which I think is actually a subset of bucket No. 3, if I
19 track it. That's an argument about lack of good faith,
20 pointing to *Miller* and what happened there, right?

21 MR. SIEGAL: Yes.

22 THE COURT: If I agree, if I think that's an instance
23 of a problem, it's tied to the length of time of maintenance of
24 the electronic data, but maybe I'm unwilling to come to any
25 sort of comparable conclusion. What is the process for

1 determining the remedy in that instance or is it your argument
2 that that somehow infuses -- that that's alone -- that's the
3 question. You understand my question?

4 MR. SIEGAL: I think I understand where you are going
5 with this. Your Honor, you can view these as two distinct
6 areas of the world and say perhaps they acted in good faith in
7 2012 and 2013 but clearly they didn't act in good faith in
8 2015, so I can certainly suppress what happens in 2015 then,
9 and we are in this difficult position of trying to somehow
10 discern what the evidence was in 2015 as opposed to what it was
11 in 2013 and where that taint goes. I think you can quite
12 clearly be looking at that taint by infusing the grand jury
13 process itself, and we will be making -- if it goes that way,
14 we will be making a motion to dismiss the indictment because
15 the whole grand jury process was poisoned.

16 I'm not saying what she did in 2015 washes away
17 everything that happened in 2013 and 2012. What I'm saying is,
18 the whole concept of good faith, as the government is arguing,
19 it doesn't make any sense anyway. And even if it does, there
20 is all sorts of ways you can look at what happened in 2012 and
21 2013 as a lack of good faith. It's not our burden to prove
22 good faith. It's the government's burden to prove good faith.
23 And I honestly don't understand what the good-faith argument is
24 other than, we ought to get to do what *Groh* says we can't do --

25 THE COURT: I understand. You've resisted my

1 question.

2 MR. SIEGAL: I don't know how to answer it better.
3 I'm not saying that what Ms. Miller did in 2015 means they
4 intended in 2013 to do that or in 2012 to do that.

5 THE COURT: Under this hypothetical I've disagreed
6 with you as to the sort of threshold question. I'm into a
7 good-faith analysis. And under my hypothetical you have
8 persuaded me that there is this one instance which is
9 problematic around the retention and use of the electronic data
10 and you have evidenced that, the absence of evidence around
11 what happened with the search in 2015. What then, as a
12 practical matter, is your position should happen?

13 MR. SIEGAL: I say your Honor needs to suppress
14 anything that was marked by Agent Miller in 2015.

15 THE COURT: Could there be some further hearing to
16 assess that? Is that what you're suggesting? It's a very
17 practical question.

18 MR. SIEGAL: I think we have to do that. I don't know
19 that it can be done because of what --

20 THE COURT: In other words, it's not your argument
21 that the sort of, OK, there is an absence of good faith;
22 therefore, it's all suppressed. That's not your contention.

23 MR. SIEGAL: Hold on one second, your Honor.

24 Your Honor, I can't argue that what Agent Miller did
25 in 2015 on its own means the government's arguments with

1 respect to what happened in 2012 lacked good faith. I think
2 those are two --

3 THE COURT: This was your lead point. It's important
4 to you. If I agree with you on your lead point and your lead
5 point alone, what then happens?

6 MR. SIEGAL: My lead point, your Honor, is, that's the
7 best example of the absence of good faith here. And it what
8 happens because of that means or whatever she did in 2015 needs
9 to be suppressed. Yes, we have to have a separate analysis of
10 where that goes. And I think the testimony shows that they may
11 be totally indistinguishable at this point. But I also think
12 that because of what she is asked to do in 2015 relates to a
13 serious problem that exists in 2013, when Agent McGuire is
14 running terms that are not on the Exhibit B list. I think that
15 shows both of those things are tainted together.

16 I want to quickly just address Mr. Ferrara's argument
17 about --

18 THE COURT: For fairness, we are now at the 45 mark.
19 I'll give you another five minutes and then Mr. Ferrara five
20 minutes for rebuttal.

21 MR. SIEGAL: I find it strange that they are
22 persisting with this argument, your Honor, because, frankly the
23 affidavit doesn't --

24 THE COURT: What's your argument?

25 MR. SIEGAL: The argument that the all-documents

1 exception or the all-records exception applies. Of course, as
2 we said multiple times, that doctrine doesn't even apply to the
3 home. Frankly, I think that undermines the argument with
4 respect to the office as well because the warrants are the same
5 and they suffer the same infirmities. The government didn't
6 apply to Magistrate Judge Dolinger for an all-records warrant.
7 The agents don't testify. They perceived this to --

8 THE COURT: You heard me ask about that. I have not
9 gone back and looked at those cases. But the government's
10 response was, the way to understand it is, what would otherwise
11 appear to be a nonparticularized warrant, you can analyze that
12 under an exception for all records. Is that your understanding
13 of the law?

14 MR. SIEGAL: First of all, *Vilar* deals with this.
15 They made the same argument in *Vilar*. Judge Karas said: You
16 didn't even ask for that in your warrant. How can I be
17 granting you post hoc an all-documents exception warrant when
18 you didn't even ask for it? It goes against the testimony,
19 your Honor, is that the agents didn't think of it that way.
20 Frankly, what it shows is, effectively, the government here is
21 conceding that these warrants covered everything. Why would
22 they be making that argument if they didn't? The truth is,
23 these warrants did cover everything and they really have no
24 other way of justifying them.

25 THE COURT: How would you answer Mr. Ferrara's

1 challenge, where you have a financial crime or series of
2 suspected financial crimes and you have a business that they
3 think is infused? What practically should they do?

4 MR. SIEGAL: They should have made a showing to
5 Magistrate Judge Dolinger, which, by the way, they didn't. If
6 you look at that affidavit, and I can get into a little bit
7 some of the various theories they have, which I think are
8 pretty flimsy for this case in general and in terms of the
9 NASDAQ --

10 THE COURT: I don't want you to go down those.

11 MR. SIEGAL: My point is, they list some very specific
12 things that they think are fishy that are going on here and
13 they list five or six transactions. But they don't say
14 anywhere in that warrant, the whole business is a fraud. Not
15 even their insider confidential informants are saying that to
16 them. They had people who were informing -- who were then
17 working at the New York Global Group and those people aren't
18 saying this whole thing is a sham. You would think those
19 people would say that and it would be in the affidavit if those
20 people were saying that. But they don't.

21 How would they go about doing that if it was? I think
22 you would have to say, the business model itself is a fraud and
23 everything that's going on there is a fraud, and we are
24 entitled to take all the records of the business, and they
25 don't say any of that.

1 THE COURT: Maybe setting the all-records question
2 aside, if they don't think it's the whole business, what would
3 a particularized warrant look like in the instance in which
4 you're investigating at least broad financial crimes, setting
5 the home aside, but what would the warrant look like for the
6 office?

7 MR. SIEGAL: Again, you can look for guidance for this
8 issue in all the cases we have cited, in *Cioffi*, in *Zemlyansky*
9 and in *Vilar* and in Judge Rakoff's opinion in *Debbi*.

10 The point is, you can't just say they are engaged in
11 wire fraud. They have some legal theories about what was going
12 on here. They relayed it to, is Benjamin Wey handing out stock
13 certificates? You have to put something in the warrant that
14 says what is -- the fraud theory that you are looking for has
15 to be somehow embodied in the warrant, for a couple of reasons.
16 One, because you have to direct the agents on what to look for.
17 Are they looking for stock certificates or are they looking for
18 tax returns that take deductions for health care costs? Those
19 are two very difference type of things.

20 THE COURT: Obviously different from the information
21 that's included in the affidavit but also the information
22 that's included in the operations plan?

23 MR. SIEGAL: Look, the operation plan is only two
24 sentences long. Would that be sufficient? I don't know the
25 answer to that question. But certainly that would give them a

1 lot more guidance than they have here, which is none.

2 I'll point out this, too, your Honor, which is a
3 number of the cases, including *Groh*, say this. The purpose of
4 the particularity requirement is not just to inform the agents
5 about what they are supposed to seize. It's also to inform the
6 recipients of the warrant what's permissible and not
7 permissible to be taken.

8 Benjamin Wey should have been on notice based on what
9 the warrant said, what the warrant covered. There is no way he
10 could have looked at that warrant and known what they could
11 take and what they could not take. That's a part of the
12 constitutional analysis here. And they don't even attempt to
13 address that. That's another reason why I think the good-faith
14 argument doesn't really work because you are not satisfying the
15 searchee's need to know what it is that's being seized.

16 Back to your question, your Honor, what would a proper
17 warrant look like? You certainly might say, we are searching
18 for evidence of pump and dump securities fraud. We are
19 searching for evidence relating to reverse merger transactions.
20 We are searching for evidence relating to satisfying NASDAQ
21 listing requirements. It would have to say something like
22 that, in addition to saying, 18 U.S.C. 1341 or 18 U.S.C. 1343
23 or 15 U.S.C. 78jd, something describing what evidence they are
24 looking for. Otherwise, they could take any piece of paper
25 that has a dollar sign on it, which was effectually what the

1 testimony was.

2 THE COURT: Thank you.

3 Mr. Ferrara.

4 MR. FERRARA: Thank you, your Honor.

5 Let me pick up with the question of remedy, your
6 Honor. As your Honor's hypothetical about Agent Miller, the
7 government's position is, whatever the remedy is, it's not
8 suppression because at the end of the day Agent McGuire was
9 clear that the documents, the files were exported based on
10 those original bookmarks and those are the files we will use at
11 trial, is everything that came from the original search. So we
12 don't think there was any harm, again, in what Agent Miller
13 did. But those documents simply were not used. That's not
14 going to be what we are going to be introducing at trial.

15 THE COURT: How do I know that from the record?

16 MR. FERRARA: Agent McGuire testified that the
17 documents were exported based on the original bookmarks.
18 That's at 337.

19 To the extent that your Honor thought that some
20 suppression was appropriate, then it would be something that we
21 think would be something that Agent McGuire had not already
22 found and, again, Agent McGuire is clear that Agent Miller
23 found no additional documents.

24 To the extent there was a different case where we were
25 going to introduce something at trial, to the extent there was

1 a different case where we found additional documents, new
2 documents in that second search, maybe suppression might be
3 appropriate there, but that is not this case. That's not what
4 happened here.

5 Just to further, as your Honor thinks and asked some
6 questions about the difference between the two searches, Mr.
7 Siegal has brought up that there was no urgency in getting the
8 NYGG warrant. Your Honor, it is not the same analysis for the
9 residence warrant because there was urgency in getting the
10 residence warrant. That was something that was done more on
11 the fly, as Mr. Siegal sort of describes --

12 THE COURT: I don't think there was testimony that
13 there was urgency, was there?

14 MR. FERRARA: The testimony was that while at NYGG,
15 agents learned that Michaela Wey kept NYGG's records at the
16 house. And that then the warrant was obtained in the middle of
17 the day. So they could get into the apartment which they got
18 into around 4 or 5:00. Again, the residence warrant was not a
19 situation where there were weeks and months to prepare that
20 particular warrant. Again, to the extent we are thinking about
21 these differently, that is a difference in obtaining those two
22 warrants.

23 THE COURT: Is it also a difference that the training
24 and the operations plan, all of that testimony was about the
25 NYGG office and there was no intervening good-faith process put

1 in place with respect to the home warrant?

2 MR. FERRARA: No. Because, to your Honor's point, it
3 was the same search team, largely the same search team. That
4 is in the exhibits, your Honor.

5 THE COURT: I trust that it wasn't. It is a separate
6 question, even if it's the same people, presumably. You've
7 just said that the need to go search the home developed in the
8 moment and obviously the home is different than the office.
9 And so, therefore, why should I consider the evidence that's in
10 with respect to the carefulness and reasonableness of what
11 occurred in the office to the home?

12 MR. FERRARA: Because, again, the question that the
13 Court is being asked or the challenge is that the agents could
14 not have known or would not have known from the face of the
15 warrant what it was they were looking for. And that's in part
16 because Mr. Siegal is pointing to the idea that there was no
17 statute listed on the face.

18 But in fact the agents understood from the briefing,
19 from the ops plan, from the availability of the affidavit --
20 again, that's unclear who read that. But the same agents who
21 went at NYGG and were asking those questions of Agent Komar,
22 getting advice from NYGG, are then the same folks. The idea
23 is, they understand the search is in relation to the same
24 investigation, that this is sort of a continuation of this
25 investigation. They are looking for the same sorts of things.

1 Komar is still on the scene. He is still answering those
2 questions. It's not as if those agents have forgotten it.

3 So when the Court asks, could these agents in good
4 faith have relied on this warrant and looked at this warrant,
5 understood what they were supposed to be looking for, the
6 answer has to be yes because those were the same agents who
7 have been educated and then in fact got more education in the
8 course of searching NYGG, getting a better sense of exactly
9 what they were looking for from Agent Komar.

10 THE COURT: Back to the original point, you think it's
11 sufficient in the record for me to conclude exigency just sort
12 of by the chronology that developed. That is to say, the
13 government, having searched the office -- yes. The next step
14 was to get a warrant based on what they learned. Their next
15 step was to get the warrant with respect to the home. I can
16 make some conclusions, inferences about exigency, a fear of
17 destruction of documents and the like, but I don't know that
18 there is any testimony about that.

19 MR. FERRARA: I think, your Honor, for instance, will
20 find in the record that agents were concerned, for instance,
21 about the destruction of evidence at the residence, that
22 once -- I don't want to go overboard.

23 THE COURT: I don't recall it. If you can point to
24 it.

25 MR. FERRARA: I think what your Honor will see, and I

1 can flip through and Ms. Hector is flipping through. There was
2 testimony that agents were sent -- I believe Agent Komar
3 testified that agents were sent to the residence to sort of
4 secure the residence.

5 THE COURT: I do recall that, that they waited
6 outside.

7 MR. FERRARA: They did wait outside. They didn't have
8 permission to go in, of course. What I'm worried about, your
9 Honor, is, I have some sort of prep in my head that I'm
10 thinking of in terms of -- what I want to say is, did they
11 serve a subpoena --

12 THE COURT: Ms. Hector can look.

13 MR. FERRARA: In any event, your Honor, I think based
14 on the fact that from the testimony that they learned it on the
15 scene, that they sent agents to the residence before they had
16 obtained the warrant. And from, again, what are logical
17 inferences that the Court can make about how investigations
18 work if you now have a defendant or a target who is now aware
19 of the investigation, spoliation issues, obstruction issues
20 that agents could be reasonably concerned about if you wait
21 two, three days. And so in light of that I think there was
22 more urgency than as to the NYGG warrant.

23 For what it's worth, your Honor, I want to make sure
24 your Honor knows or has this cite. Mr. Siegal has talked about
25 the number of search terms that Agent Miller used. I believe

1 she testified it was five to 10. And I think that's at
2 transcript 371.

3 THE COURT: He said 150 or something.

4 MR. FERRARA: There was a number of documents that
5 were returned and I think she did testify about the number of
6 documents that were returned. But as to search terms, it
7 was --

8 THE COURT: She didn't remember and he did date
9 ranges. Is that where we ended, at five to 10? I can't
10 recall.

11 MR. FERRARA: At transcript 371 you asked: Do you
12 remember approximately how long the list of search terms you
13 were provided? Agent Miller responded: From what I recall, I
14 would say it was anywhere between five to 10 search terms.

15 Your Honor, two more points I would briefly make. I
16 think your Honor understands. When agents go into a residence
17 to search for documents, this is not a situation where you can
18 sort of do math and say 15 boxes divided by 10 agents times 60,
19 etc. It's a large apartment. Your Honor has the photos of the
20 apartment. Documents can be anywhere. The agents had found
21 documents in a trash bag in a suitcase in a closet. They are
22 going to check drawers. They are going to check maybe under
23 bed mattresses. They are going to look everywhere for
24 potentially hidden documents. It takes time. They were not
25 all focused on this room. These sorts of searches take time.

1 Children were out of the apartment. They were hoping to get
2 them in. Mrs. Wey reasonably was saying, I need to get my kids
3 back here. When are you leaving? Under these circumstances,
4 this is not the sort of sufficiently culpable conduct that we
5 are looking to deter.

6 The last point I would make, your Honor, is this.
7 Defense has said over and over that these search terms
8 inappropriately expanded the search, but, as far as I know,
9 have not pointed to, for instance, one document with Dogan
10 Erbek's name on it that they are suggesting is outside the
11 scope of the warrant. We have not seen that because it doesn't
12 exist because communications between Mr. Wey, Tianyi Wey, and
13 Mr. Erbek are at the heart of this matter, for instance. I
14 just wanted to flag that we have not seen where those
15 electronic files are that were captured that were outside the
16 scope of the warrant.

17 And the cites that Ms. Hector has helpfully found.
18 Your Honor, we would cite for that proposition transcript at
19 136, which is Agent Komar's testimony, and transcript 253 to 54
20 at Agent McGuire's testimony.

21 THE COURT: Just on your first point, which I think is
22 sort of a prejudice point, you cited the record at 337 for
23 Agent McGuire, testimony about, in the end, not using any
24 documents from the Miller search that had not been originally
25 tagged once the original tags were recovered. There is

1 something common sensible about that. I'm just wondering if
2 you have authority for the idea that that is an appropriate
3 component of the analysis.

4 MR. FERRARA: I guess I don't have a specific case at
5 my fingertips. But I think what we see courts do in this space
6 is try to find reasonable approaches, reasonable remedies or
7 limited remedies that sort of go to the harm itself.

8 And so I don't think it's legally unsound for me to
9 suggest that this Court can take an approach that says, you
10 know, I find that the best practice is not to -- for instance,
11 would be to train the agent in this way. However, given the
12 circumstances of this case, suppression would be too severe a
13 remedy. Given that additional documents were not found, the
14 documents at trial will not flow from what Agent Miller found,
15 etc. The shaping of remedies like that, I think the Court has
16 discretion and the Court has exercised that discretion. What
17 I'm suggesting is, given what we know about how that search
18 went and what was used, it would be too severe a remedy for the
19 Court to suppress, wholesale suppress the electronic evidence.

20 THE COURT: Let me ask you another remedy question
21 which I think would be something more at the front-end
22 analysis. If I think there are aspects of the warrant that are
23 nonparticularized, is there any authority for severability with
24 respect to other aspects of the warrant?

25 MR. FERRARA: Well, your Honor has asked about

1 severability. I don't know in terms of severability of the
2 warrant. Certainly there are cases where courts have
3 suppressed more or less or suppressed specific documents,
4 allowed other things. Again, I think that's within the Court's
5 discretion. We don't think any suppression is appropriate.
6 But certainly wholesale suppression, we would argue, would be
7 too severe and we would ask if there is going to be suppression
8 that it be limited to where the Court believes the government
9 sort of went too far or acted unreasonably and limit the remedy
10 to that.

11 THE COURT: Thank you, counsel.

12 MR. SIEGAL: Couple of points, your Honor, quickly
13 just to respond --

14 THE COURT: At some point it has to end because what
15 if he wants to respond to what you say and then you want to
16 respond to what he says. I'll give you two minutes and then we
17 are done.

18 MR. SIEGAL: Thank you very much, your Honor. I
19 appreciate your indulgence.

20 Just on the issue of what your Honor was sort of
21 asking before and Mr. Ferrara was sort of addressing damages,
22 this notion that Mr. McGuire testified that no new documents
23 were found, we simply actually don't know that.

24 I think what the testimony is is that Agent Miller ran
25 five to 10, at least, search terms plus, don't forget, did

1 list, find me documents that are like this and the agent says
2 there is no way to tell what was tagged by her versus what was
3 tagged by Mr. McGuire back in 2013. Her actions put a taint to
4 the entire electronic review.

5 And, in fact, although Mr. McGuire says it was never
6 actually used, what he testified to is that the technological
7 glitch wasn't fixed for a couple of months after they realized
8 the problem which would have been well after the indictment was
9 obtained based on Agent Miller's work. The notion that there
10 is no issue here or nothing to see here is just contrary to the
11 record.

12 On the issue of severability, this gets a little bit
13 to Mr. Ferrara's argument that we are not going to find any
14 items that are not responsive to the warrant. Again, it goes
15 to what is responsive to a proper warrant here.

16 Their argument is, well, if there are documents that
17 say Dogan Erbek on them, but also say Benjamin Wey or NYGG,
18 therefore, those documents are responsive. My answer to that
19 is, only if you view a warrant that says go to Benjamin Wey's
20 office and take everything related to Benjamin Wey and go to
21 Benjamin Wey's home and take everything related to Benjamin
22 Wey, there is no severability opportunity for these warrants.
23 Because you would have to say, we are kicking out the search
24 term or the idea that the offices of NYGG and Ben and Michaela
25 Wey and the home of Ben and Michaela Wey are not valid concepts

1 because that is what makes this a general warrant.

2 THE COURT: Thank you.

3 Motion is submitted.

4 We are adjourned. Thank you, counsel. Have a good
5 day.

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